

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

CNA INSURANCE COMPANY LIMITED,

Plaintiff,

v.

EXPEDITORS INTERNATIONAL OF  
WASHINGTON, INC., d/b/a EXPEDITORS  
INTERNATIONAL OCEAN, PAPPAS  
TRUCKING LLC and DOE I,

Defendants.

Case No. C18-932-RSM

ORDER DENYING MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on Defendant Expeditors International of Washington, Inc., and Expeditors International Ocean, Inc. (collectively “Expeditors”)’s Motion for Summary Judgment. Dkt. #87. Plaintiff CNA Insurance Company (“CNA”) opposes. Dkt. #90. For the reasons stated below, the Court finds that Plaintiff has established a genuine dispute as to material facts precluding summary judgment dismissal of its claims and DENIES the Motion.

**II. BACKGROUND**

This case arises from damage to a shipment of ladies footwear (the “Cargo”) in containers SEGU5177600, FCIU8214591, CAIU8231369 and FCIU8249387 (the “Containers”) during transportation from Vietnam to Ohio. Dkt. #1. Plaintiff CNA filed this action alleging that Defendant Expeditors failed to properly deliver the Cargo in the same good order and condition



the movant is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). An issue is “genuine” if “a reasonable jury could return a verdict for the nonmoving party” and a fact is material if it “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence is viewed in the light most favorable to the non-moving party. *Id.* “[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995). It should also be granted where there is a “complete failure of proof concerning an essential element of the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). “The mere existence of a scintilla of evidence in support of the non-moving party’s position is not sufficient” to prevent summary judgment. *Triton Energy Corp.*, 68 F.3d at 1221.

## **B. Analysis**

### **i. CARRIAGE OF GOODS BY SEA ACT**

By its terms, COGSA applies “to all contracts for carriage of goods by sea to or from ports in the United States in foreign trade.” 46 U.S.C. § 1312 (1982). The term “contract of carriage” includes only those “contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or document of title regulates the relations between a carrier and a holder of the same.” *Id.* § 1301(b).

Under COGSA, a shipper has the burden of proving that the cargo was damaged while in the custody of the carrier (i.e., loaded in good condition, discharged in damaged condition). 46

1 U.S.C. §§ 1302, 1303; *American Home Assur. Co. v. American President Lines, Ltd.*, 44 F.3d  
 2 774, 777 (9th Cir.1994). Once such evidence has been received, a *prima facie* case has been  
 3 shown and the burden of proof shifts to the carrier to establish that the loss came under a statutory  
 4 exception to COGSA. *Taisho Marine & Fire Ins. v. M/V Sea-Land Endurance*, 815 F.2d 1270,  
 5 1274-75 (9th Cir.1987). Sections 4(2) and 4(4) of COGSA provide a number of exceptions to the  
 6 imposition of liability on the carrier, such as acts of God, acts of war, and other causes arising  
 7 without the actual fault of the carrier. 46 U.S.C. §§ 1304(2), 1304(4). If the loss does not fall  
 8 within one of the enumerated exceptions, then the carrier is subject to liability under COGSA. *Id.*

10 There are two general ways a plaintiff can make out such a *prima facie* case under  
 11 COGSA. First, the plaintiff may present direct evidence relating to the healthy condition of the  
 12 goods at delivery and their damaged condition at outturn. *Transatlantic Marine Claims Agency,*  
 13 *Inc. v. M/V OOCL Inspiration*, 137 F.3d 94, 98 (2d Cir. 1998). The second way a plaintiff may  
 14 discharge its burden is to show that the characteristics of the damage suffered by the goods justify  
 15 the conclusion that the harm occurred while the goods were in the defendant's custody. *Id.* at 99.  
 16 This second avenue is available because not infrequently a plaintiff who is unable to provide  
 17 specific evidence as to the condition of the goods at delivery or outturn, can nonetheless show,  
 18 by the nature of the damage, that the injury complained of happened to the cargo while it was in  
 19 the carrier's custody. *Id.*

## 22 **ii. Plaintiff's *Prima Facie* Evidence**

23 It is undisputed that the cargo was damaged, and neither party has produced convincing  
 24 direct evidence of the Cargo's condition at the time of delivery to the carrier. However, Plaintiff  
 25 argues it can establish its *prima facie* case under the second avenue and offers photographs that  
 26 demonstrate the good order and condition of the Cargo when loaded in the Containers, and the  
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1 deposition testimony and declaration of David Giardino, FitFlop's Director of Operations in 2017.  
2 Defendant argues that this evidence is inadmissible and therefore should not be considered by the  
3 Court. The court disagrees for the following reasons.

4 **iii. Photograph Authenticity**

5 Defendant argues that the photographs produced in discovery are not witness  
6 authenticated, and therefore cannot be offered as evidence in trial. *See* Dkt. #87 and #91. Plaintiff  
7 counters by arguing that the metadata of the photographs lends credibility to their authenticity as  
8 it shows the date and time that the photographs were taken. Dkt. # 90.

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10 A recent Nevada District Court case, *Tamares Las Vegas Properties, LLC v. Traveers*  
11 *Indemnity Company*, has provided some insight on the authenticity of metadata. 586 F.Supp.3d  
12 1022. In *Tamares*, Plaintiff sought to authenticate and admit photographic evidence using the  
13 date and time stamps within the photos' metadata. In response, Defendant did not argue or present  
14 any evidence that these photos or their metadata were adulterated in any way, but rather pointed  
15 out that the contractor's employees were unable to bring forward witnesses who could  
16 authenticate the photographs. *Id.* Under FRE 901, to authenticate "an item of evidence, the  
17 proponent must produce evidence sufficient to support a finding that the item is what the  
18 proponent claims it is," such as the item's distinctive "appearance, contents, substance, internal  
19 patterns, or other distinctive characteristics of the item, taken together with all the circumstances."  
20 *Id.* at 1031. Thus, the court held that the metadata was sufficient for authenticity purposes and  
21 admitted the evidence, with the caveat that "the credibility or probative force of the evidence  
22 offered is, ultimately, an issue for the jury." *Id.* (citing *United States v. Black*, 767 F.2d 1334, 1342  
23 (9th Cir. 1985)).  
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1 Similarly, in the present case, the Defendant has shown no reason to doubt the photos'  
2 distinctive metadata's authenticity. Therefore, the court will deem the photos authentic, but  
3 Defendant may still elicit and present evidence regarding metadata reliability and accuracy.

4 **iv. Testimony of David Giardino**

5 Defendant also argues that the testimony of David Giardino is without foundation and  
6 speculative at best, and therefore cannot prove that the cargo was in good condition when  
7 delivered to Expeditors' custody. The Court agrees that Mr. Giardino cannot testify about the  
8 condition of the cargo at the time of its delivery since he was not physically present. However,  
9 testimony regarding his personal knowledge of the loading procedures followed and documents  
10 prepared at Golden Star, his understanding of the relationship between Golden Star and  
11 Expeditors, and his experience dealing with the damaged footwear when it arrived at the ODW  
12 Facility are all first-hand knowledge that he can speak to.

15 Relevant information is "any matter that bears on, or that reasonably could lead to other  
16 matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc.*, 437  
17 U.S. at 351. Further, "in judging the credibility of a witness and determining the weight to be  
18 given to his testimony, the trier of the fact may consider the witness' demeanor and manner while  
19 on the stand, the character of his testimony as being probable or improbable, inconsistencies,  
20 patent omissions and discrepancies in his testimony, or between the testimony of different  
21 witnesses, contradictory testimony, his interest in the outcome of the case, his relationship to the  
22 litigants, and many other factors bearing upon the truthfulness or untruthfulness of the witness'  
23 testimony." *Young Ah Chor v. Dulles*, 270 F.2d 338, 341 (9th Cir. 1959). Because Mr. Giardino  
24 has personal knowledge of the standard procedures followed by the factories when loading cargo  
25 into containers, including the use of chassis, the jury should be allowed the opportunity to listen  
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1 to his testimony and determine for themselves whether they find him credible and what weight  
2 should be given to such evidence.

3 **v. Factual Dispute Regarding the Rain**

4 Finally, the filings have established that there is a factual dispute as to when and in whose  
5 custody the rain damage occurred, which is a question that precludes summary judgment and  
6 should be decided by a jury. Accordingly, Defendant's Motion is DENIED.  
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8 **IV. CONCLUSION**

9 Having reviewed the relevant briefing and the remainder of the record, the Court hereby  
10 finds and ORDERS that Expeditor's Motion for Summary Judgment Dkt. #87 is DENIED.  
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13 DATED this 19<sup>th</sup> day of October, 2023.

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17 RICARDO S. MARTINEZ  
18 UNITED STATES DISTRICT JUDGE  
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